85-845

Supreme Court, U.S.
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CLERK

No. -

In the
Supreme Court of the United States.

OCTOBER TERM, 1985

JOHN DEMJANJUK,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

— APPENDIX —

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Counsel of Record,
JOHN J. GILL AND
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NOT FOR PUBLICATION

FILED
JUNE 28, 1985
JOHN P. HEHMAN, Clerk

No. 85-3198

United States Court of Appeals For the Sixth Circuit

UNITED STATES OF AMERICA,
RESPONDENT,

v.

JOHN DEMJANJUK,
PETITIONER.

ON APPEAL FROM THE IMMIGRATION AND NATURALIZATION SERVICE

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

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BEFORE: KENNEDY and MILBURN, Circuit Judges; and BERTELSMAN, District Judge

PER CURIAM. Petitioner John Demjanjuk's certificate of naturalization was revoked by the United States District Court for the Northern District of Ohio on June 23, 1981. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982). Demjanjuk's subsequent motions to have the district court's judgment set aside under Rule 60(b) were denied by the district court, and the district court's judgments were affirmed by this court. *United States v. Demjanjuk*, 103 F.R.D. 1 (N.D. Ohio 1983), and No.

C77-923 (N.D. Ohio Feb. 12, 1985), *aff'd after consolidation*, No. 84-3106 and No. 85-3212, (6th Cir. 1985) (filed simultaneously with the instant opinion).

On December 6, 1982, deportation proceedings were commenced, and on May 23, 1984, the Immigration Court ordered Demjanjuk deported. Demjanjuk's deportability was subsequently affirmed by the Board of Immigration Appeals ("BIA"). Demjanjuk now seeks review of the order of deportation and argues (1) that the BIA improperly applied the doctrine of collateral estoppel to the findings of the district court's denaturalization proceeding, and (2) the record does not contain reasonable, substantial, and probative evidence which, when considered as a whole, would support a finding of deportability. For the reasons that follow, we affirm.

Collateral Estoppel

The deportation proceedings now being reviewed were brought against Demjanjuk pursuant to §§ 241(a)(1), (2) and (19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), (2) and (19). These sections provide:

> (a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who —
>
> (1) at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry;
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * *
>
> (19) during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with —
>
> (A) the Nazi government of Germany,

> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

With regard to section 241(a)(1), the government charged that Demjanjuk was excludable under sections 2, 10, and 13 of the Displaced Persons Act ("DPA") and sections 13 and 25 of the Immigration Act of 1924. As to section 241(a)(2), the government charged that Demjanjuk entered the United States in violation of sections 2, 10, and 13 of the DPA and sections 13 and 25 of the Immigration Act of 1924. Finally, the government charged that pursuant to section 241(a)(19) Demjanjuk was deportable because he ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion, under the direction of, or in association with, the Nazi government of Germany.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979). The first issue which the government claims was actually and necessarily determined in the denaturalization proceeding — and therefore conclusive in this deportation proceeding — was Demjanjuk's alienage. The alienage issue is required in the deportation proceedings because section 241(a) is applicable only to "any alien."

The government alleged in its order to show cause that Demjanjuk was "not a citizen or national of the United States." In concluding its opinion on the denaturalization hearing, the district court held:

> [t]he November 14, 1958 order of the United States Court for the Northern District of Ohio, admitting the defendant, John Demjanjuk, to citizenship of the United States of America, is hereby revoked and vacated and his Certificate of Naturalization, No. 7997497, is cancelled on the grounds that such order and Certificate were illegally procured and were procured by willful misrepresentation of material facts under 8 U.S.C. § 1451(a).

United States v. Demjanjuk, 518 F. Supp. at 1386.

Similarly, the government alleged that Demjanjuk was "a native of the Ukraine and a stateless person." In the district court's finding of fact section it stated: "The defendant, John Demjanjuk, was born on April 3, 1920, in the village of Dub Macharenzi, Ukraine, a republic of the U.S.S.R." *Id.* at 1363.

The second issue found by the BIA to have been actually and necessarily determined in the denaturalization trial related to Demjanjuk's activities during World War II. For purposes of the instant case, these findings establish Demjanjuk's excludability under the DPA and, consequently, his deportability under section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1). Similarly, these findings establish Demjanjuk's entry in violation of the DPA and, therefore, his deportability under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), as well as his involvement with the German SS and deportability under section 241(a)(19) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(19).

Demjanjuk's relevant wartime activities can be divided into two major periods. First, in the denaturalization proceeding, the government asserted that Demjanjuk, as a Russian POW, was trained by the German SS at the Trawniki training camp for guard service at one of the death camps. On this issue the district court concluded "that the defendant was present at Trawniki." *Demjanjuk*, 518 F. Supp. at 1366. This conclusion was based largely on Government Exhibits 5 and 6, *i.e.*, both sides of an identification card stating " 'Iwan Demjanjuk is employed as a guard in the Guard Units (Wachmannschaften) of the Reich Leader of the SS and Police Headquarters in the New Eastern Territory . . . HEADQUAR-

TERS LUBLIN, TRAINING CAMP TRAWNIKI . . .' " *Id.* After reviewing the authenticating evidence, the district court found "that Government's Exhibits 5 and 6 are authentic and clearly show that defendant was at the German SS training camp of Trawniki." *Id.* at 1368 (footnote omitted).

The second major period in Demjanjuk's wartime activities involved the actual service as a guard at the Nazi death camp of Treblinka. The evidence before the court on this issue included the testimony of five (5) Jewish survivors and one (1) SS guard. Each of these witnesses identified Demjanjuk's visa photo from a photo spread. Furthermore, several of these witnesses testified to specific atrocities committed by Demjanjuk including Demjanjuk's placing prisoners in the gas chambers and operating the motors which sent the gas into the chambers. After reviewing the evidence, the district court concluded that defendant (Demjanjuk) was present at Treblinka in 1942-1943. *Id.* at 1376.

The third issue found by the BIA to have been resolved by the district court involved Demjanjuk's application for a visa under the DPA and his immigration into the United States. The district court found that Demjanjuk applied to the Displaced Persons Commission for consideration to immigrate to the United States. The district court then found that Demjanjuk "made . . . misrepresentations, concealing his service with the German SS and the German military." *Id.* at 1379.

Finally, the question of Demjanjuk's excludability under the DPA was specifically resolved by the district court and affirmed by this court. *Demjanjuk*, 518 F. Supp. at 1382, *aff'd*, 680 F.2d at 33. This conclusion was that Demjanjuk was not eligible for a visa under the DPA.

It is clear that the above issues were necessary to the district court's decision to revoke Demjanjuk's citizenship. The district court held that "[s]ince defendant was ineligible for a visa under the DPA, his citizenship must be revoked as 'illegally procured' because he failed to satisfy a statutory prerequisite of naturalization." 518 F. Supp. at 1382 (footnote omitted). This holding was, of course, based on the district court's necessary findings with regard to Demjanjuk's wartime activities and willful misrepresentation of them. The district court's findings on these same issues render Demjanjuk deportable under 8 U.S.C. § 1251.

Substantial Evidence

Demjanjuk also argues that the record does not contain reasonable, substantial and probative evidence which, when considered as a whole, would support a finding of deportability based on the high standard of proof in this case. Having carefully reviewed the record, we disagree. The record in this case clearly supported the conclusion based upon clear, convincing and unequivocal evidence that Demjanjuk served with the Nazi SS at Trawniki and Treblinka and, further, that he misrepresented his wartime activities during the immigration process.

Moreover, we note that Demjanjuk admitted that he misrepresented his wartime activities in order to obtain an immigration visa. As noted by the Immigration Court:

> [Demjanjuk] conceded that he was a member of the Vlassov army while under the jurisdiction of the German army as a prisoner of war. [Demjanjuk] freely concedes that he had blood type markings [such as those given to members of the SS]. He conceded that he did not truthfully state his places of residence, the locations of places where he was interned by the German army, and the places and dates of his activities during the crucial years . . . He further concedes that the information contained in his immigrant visa used for entry into the United States does not contain accurate or truthful information regarding these matters.

Immigration Court Opinion at 9-10 (App. 9-10). Thus, as the Immigration Court held, Demjanjuk is deportable, based solely on the concessions that he made.

Conclusion

For the reasons stated herein, the judgment of the Board of Immigration is AFFIRMED.

May 23, 1984

United States Department of Justice
Executive Office for Immigration Review
Office of the Immigration Judge
Cleveland, Ohio

FILE AR 237 417

IN THE MATTER OF

JOHN DEMJANJUK,
RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGES:

1) Section 241(a)(1) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 1251(a)(1)] — At the time of your entry into the United States, you were excludable under Section 2 of the DPA and Sections 13 and 25 of the Immigration Act of 1924.

2) Section 241(a)(1) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 1251(a)(1)] — At the time of your entry into the United States, you were excludable under Section 10 of the DPA and Sections 13 and 25 of the Immigration Act of 1924.

3) Section 241(a)(1) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 1251(a)(1)] — At the time of your entry into the United States, you were excludable under Section 13 of the DPA and Sections 13 and 25 of the Immigration Act of 1924.

4) Section 241(a)(2) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 1251(a)(2)] — You entered the United States in violation of Section 2 of the DPA and Sections 13 and 25 of the Immigration Act of 1924.

5) Section 241(a)(2) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 1251(a)(2)] — You entered the United States in violation of Section 10 of the DPA and Sections 13 and 25 of the Immigration Act of 1924.

6) Section 241(a)(2) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 1251(a)(2)] — You entered the United States in violation of Section 13 of the DPA and Sections 13 and 25 of the Immigration Act of 1924.

7) Section 241(a)(19) of the Immigration and Nationality Act of 1952, as amended [8 U.S.C. Section 125(a)(19)] — You ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933 and May 8, 1945, under the direction of or in association with the Nazi government of Germany.

APPLICATION:

1) Termination of deportation proceedings
2) Application for asylum under the Refugee Act of 1980 and for withholding of deportation under the provision of Section 243(h) of the Immigration and Nationality Act as amended.
3) Application for suspension of deportation under the provision of Section 244(a) of the Immigration and Nationality Act as amended.

4) Application for the privilege of voluntary departure.

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Language

Ukranian

Interpreter

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Decision of the Immigration Judge

The respondent is a 64-year-old married male alien, a native of Ukraine (United Soviet Socialist Republic) and an alleged stateless person. The alien respondent entered the United States at New York, New York on February 9, 1952 under the Displaced Persons

Act (Public Law 80-774 Chapter 647; 62 stat. 1009 1948; and the Immigration Law of 1924). An Order to Show Cause in this case issued on July 1, 1982 and was served on respondent July 12, 1982. As a result of the service of this Order to Show Cause the respondent did not appear at a hearing since there was an appeal to a higher court from a decision from the United States District Court in Cleveland, Ohio and the Order to Show Cause was cancelled [Exhibit 1(a)]. A second Order to Show Cause issued on December 6, 1982 and was served on the respondent on February 6, 1982. In a similar fashion to the first Order to Show Cause, the Order to Show Cause issued on December 6, 1982 contained seven charges of deportability, six of them having to do with a person who was either excludable because of violations of certain provisions of the Displaced Persons Act and the Immigration Act of 1924 or was deportable after entry for having violated those same provisions of law. Charge 7 was the most crucial of the various charges since it entailed the contents of subsection 241(a)(19) of the Immigration and Nationality Act of 1952 as amended and reads that, "You ordered, incited, assisted, or otherwise participated in the persecution of persons because of race, religion, national origin, or political opinion between March 23, 1933 and May 8, 1945 under the direction of or in association with the Nazi government of Germany". The 11 allegations of fact contained in the Order to Show Cause were drawn to reach those conclusions of deportability.

After several aborted attempts the hearing was opened with the respondent present on April 11, 1983 and with continuances and postponements for valid reasons, the reopened proceedings was closed on February 7, 1984.

The respondent, represented by counsel, pleaded to the contents of the Order to Show Cause. The seven charges of deportability were neither admitted nor denied. The eleven allegations of fact contained in the Order to Show Cause were neither admitted nor denied. The respondent declined to name a country for deportation when that was asked and when the Union of Soviet Socialist Republics was directed, the respondent, after much discussion, requested the relief from deportation and requested asylum under the Refugee Act of 1980 and also requested withholding of deportation under the provisions of Section 243(h) of the Immigration and

Nationality Act as amended. After an explanation and again some discussion, the respondent requested the relief available to him under the provisions of Section 244(a) of the Immigration and Nationality Act as amended, that is, suspension of deportation. The respondent hesitated in asking for the privilege of voluntary departure and the Court considered that in order to preserve that right to the respondent it would consider that request was made for the privilege of voluntary departure. The respondent asked that the Court terminate deportation proceedings because deportability was neither admitted nor denied and on the basis of several motions which were made and are now part of the record.

The Service offered evidence into the record in addition to the two Orders to Show Cause, the respondent offered a medical prescription for some medication explaining why the attempts to hold a hearing prior to the starting date of April 11, 1983 could not be accomplished. Exhibit 3 was an offer of all of the evidence developed in the trial in United States District Court in *U.S. v. Demjanjuk* which was a proceedings in which the respondent's naturalization was revoked. The evidence with that record include video tapes, documents, testimony of record, affidavits, and other material and is all contained in this record of proceeding as Exhibit 3. Exhibit 4 were the basic letters necessary to accomplish the substitution of attorneys from John W. Martin who was the attorney of record when the respondent appeared before the United States District Court on the revocation of naturalization charge and when he was originally served with an Order to Show Cause. Exhibit 5 were respondent's reply brief regarding the records offered by the Government with regard to the United States District Court trial on revocation of naturalization. The Government also advanced a motion that this Court should arrive at a decision without more by considering its position on the theory of equitable estoppel. In the alternative it asks this Court in a decision favorable to the Government in finding the respondent deportable on the basis of evidence of record including the documents contained in United States District Court trial also known as *U.S. v. Demjanjuk;* 518 F. supp. 1362; affirmed in the Sixth Circuit Court of Appeals; 680 F.2d. 32; certiorari denied by the United States Supreme Court.

Respondent submitted a brief as has been stated in opposition to the Government position but the Court reserved judgment on the motion advanced by the Government. Other motions were also made during the proceedings and, except for those which were necessary to decide on the date made for proper procedure, all motions have been taken under advisement. Some of the motions were granted such as those for continuances and those for appropriate procedures during the pending litigation.

This Court familiarized itself with the entire record of proceedings before the United States District Court and the Circuit Court of Appeals. All of the evidence contained in the record of that trial was also reviewed and will be considered in any decision made hereafter.

In the very first session this Court fully explained to each of the parties the procedure to be followed when there would be witnesses to be called for testimony before this Court. The Court explained that an offer of proof, including an affidavit of prospective witnesses was required for a proper consideration of this Court for presentation of witnesses for testimony on the record (transcript of May 12, 1983, page 29, lines 13-25 and page 30, lines 1-13). The record establishes that these instructions were not followed.

The record contains lengthy arguments and colloquy between counsel on many of the issues but these arguments were not supported by probative evidence or judicial precedents.

Respondent did testify on the issue of asylum and withholding of deportation and on the issue of deportation. The witnesses presented to this Court were granted an opportunity to testify on behalf of the respondent and this was so even for the last three who, after a preliminary questioning by the Court, were able only to testify to matters which are cumulative on the record or it was determined that they had no specific evidence to give or testimony to give on the issue which was pertinent to the issues raised in these proceedings. This Court considers that the crucial issue in these proceedings are the respondent's behavior and activity wherever he happened to be between the years of 1941 and 1952 before he entered the United States. None of the witnesses was able to address those issues. Each of the various witnesses, whether it was the real estate agent, Mr. Brentar, who testified that he visited Poland shortly before testifying before this Court and his testimony makes up a considerable portion of the record or whether it was

Rudolph Reiss, the noncommissioned officer in the Totenhead S. S. Division of the German army, neither of the witnesses could testify that they knew the respondent during the crucial years mentioned, 1941 through 1952. None of the witnesses satisfied this Court that they had anything to offer on the respondent's places of residence, his location during any of those stated years, or his activities during that particular period of time.

Respondent has also raised an issue of fraud or misfeasance on the part of the Office of Special Investigations. This issue of misfeasance or malfeasance or fraud or misrepresentation centers around a document termed the Trawniki I.D. card (Exhibit 5 and 5(a) in the United States District Court trial) and is contained in Government Exhibit 3 in this record. This same matter was brought before the United States District Court in a motion to reopen the denaturalization trial (Group Exhibit 22) and the District Court denied the motion. The affidavits of the two witnesses, Otto Horne and Frederich Schaefer, originally testified and whose witnesses were available in the United States District Court. The Court considered their testimony both at the time of the original denaturalization proceeding and had an opportunity to review the affidavits which are now a part of this record in the motion to reopen the denaturalization proceedings and the decision of the United States District Court Judge in arriving at his decision was that the new affidavit did not present sufficient cause to cause the Court to reopen the denaturalization proceeding. The Court was satisfied that the record as it stood even with the removal of the testimony of these two witnesses would have resulted in the same decision. The Deportation Court comes to the same conclusion since it does not find that the testimony of the two witnesses, taken in their best light, favorable to the respondent fails to establish that they exculpate him from the charge laid against him by the remaining witnesses who testified and whose evidence was presented to the United States District Court on the denaturalization proceedings. The evidence of record, primarily that from the denaturalization trial, satisfies this Court that the respondent is deportable by evidence that is clear, convincing, and unequivocal. Respondent's own testimony, taken in its best light, does not establish respondent's behavior and activity during the years between 1941 and 1952 were such that this Court could be satisfied that the respond-

ent was not involved . . the activities with which he was charged in the Order to Show Cause and in the denaturalization trial in the United States District Court. It is also important to note that the repondent made certain admissions. Respondent conceded that he was a member of the Vlassov army while under the jurisdiction of the German army as a prisoner of war. Respondent freely concedes that he had blood type markings under his arm and had them removed after the war ended. He conceded that he did not truthfully state his places of residence, the locations of places where he was interned by the German army, and the places and dates of his activities during the crucial years while he was a captive and under the control of the German army until up to and including the date on which he completed the necesssary documentations to obtain an immigrant visa for entry into the United States. He further concedes that the information contained in his immigrant visa used for entry into the United States does not contain accurate or truthful information regarding these matters. While it is true that the respondent time and again denied complicity or guilt in assisting the guards and managers of the prison camps Treblinka or Trawniki, the evidence of record (see Exhibit 3) and the District Court trial convinces this court otherwise.

The respondent, in the opinion of this Court, is therefore deportable as charged in all seven of the charges of deportability. The first six charges, while they were neither admitted or denied in the pleadings, are proveable by the concessions made by the respondents that he wilfully made misrepresentations of fact with regard to his places and locations of residence and stay while a captain in the German army. The other evidence convinces this Court that he is deportable by evidence that is clear, convincing, and unequivocal under the provisions of subsection 241(a)(19) of the Immigration and Nationality Act as amended and therefore, in addition to being deportable, is ineligible for relief as an asylee under the Refugee Act of 1980 and is also ineligible for withholding of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act as amended. Additionally, there is a minimum of evidence in support of the respondent's claim to these benefits. Respondent apparently relies upon a 1928 episode of starvation and planned death of Ukranians as a platform from which to predicate his claim to asylum and withholding of depor-

tation and in addition poses the threat of the U.S.S.R.'s prisoner of war treatment shortly after the close of World War II in which there is evidence to establish that all persons captured by the German army were treated as deserters. It is not specifically clear whether all of such persons treated as deserters were shot to death or only some of them. The evidence from the record established that in some instances this did occur but it also establishes that the Russian (U.S.S.R.) government modified its approach and granted an amnesty to all returning persons who were captured by the German army during the war. This last statement has been conceded by the witness, Mr. Brettnaur on the record. Mr. Brettnaur stated that he was a member of the international relief organization for a period of time.

The evidence of record with regard to suspension of deportation under the provisions of Section 244(a) of the Immigration and Nationality Act might result in a favorable decision were it not for the deportability charge which this Court considered proved under Section 241(a)(19). The respondent has a long and favorable record of residence in the United States without arrest or any involvement in crimes or other immoral activity and has a family in the United States, all the members of which are United States citizens. However, the respondent chooses to rest on prima facie case made in the application but the application for that relief must also be denied on the basis of the ground of deportability where the Holtzman Amendment is applicable.

On February 7, 1984 this Court advised the parties that the hearing was closed. Each of the parties were advised that should they seek reopening of the deportation proceedings they would be required to comply with the contents of the appropriate regulations (8 CFR 242.22 and 8 CFR 103.5). Letters and motions were addressed to this Court to take depositions, to issue subpoenas, to honor subpoenas prepared by the respondent through his attorney, and no request was made actually of this Court to issue subpoenas even though that is an improper act for this Court to issue subpoena for a person residing in a foreign country. The deciding factor, however, in a denial of the applications for either the taking of foreign depositions or permitting subpoenas to be served on people in foreign countries were that possible is simply the fact that the respondent and the Government have failed to establish that there

was not sufficient time and not sufficient opportunity to prepare such requests and to conduct such investigations prior to the closing date of February 7, 1984. It must be considered that the respondent was aware of the contents of the Order to Show Cause as was the Government upon the original issue of the Order to Show Cause. This would be so at least with regard to the deportation proceedings. When it is considered that the respondent and the Government also had an investigation conducted abroad and through the United States District Court had taken video tape transcripts of witnesses abroad, it raises an interesting question of why they would now ask for a reopening of the deportation proceeding to do what should have been done in the original trial before the United States District Court on the issue of the denaturalization proceedings. Because of this, of course, those motions will all be denied.

Because I find respondent deportable under all seven charges contained in the Order to Show Cause, and particularly because one of those sections relates to Section 241(a)(19) of the Immigration and Nationality Act as amended, the following decision will issue.

ORDER: IT IS ORDERED that the motion to terminate deportation proceedings be and is hereby denied.

IT IS FURTHER ORDERED that respondent's application for asylum under the Refugee Act of 1980 and for withholding of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act be and is hereby denied since he is found deportable under the provisions of Section 241(a)(19) of the Immigration and Nationality Act as amended.

IT IS FURTHER ORDERED that the application for suspension of deportation under the provisions of Section 244(a) of the Immigration and Nationality Act as amended be and is hereby denied, such relief being barred under the provisions of Section 241(a)(19) of the Immigration and Nationality Act as amended which this Court finds applies to this respondent.

IT IS FURTHER ORDERED that the motion for collateral estoppel which would specifically prevent the respondent from contesting the record of proceedings in this case as propounded by the Government be and is hereby granted.

IT IS FURTHER ORDERED that in lieu of an order of deportation respondent be granted voluntary departure without expense to the Government on or before 30 days from the date of this decision or any extension beyond such date as may be granted by the District Director for the Immigration and Naturalization Service and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: respondent shall be deported from the United States to be Union of Soviet Socialist Republics (Russia) on the charges contained in the Order to Show Cause.

/S/ ADOLPH F. ANEGLILLI
Immigration Judge

February 14, 1985

United States Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Falls Church, Virginia 22041

FILE: AR 237 417 – Cleveland

IN RE

JOHN DEMJANJUK

IN DEPORTATION PROCEEDINGS
APPEAL

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On Behalf of Service

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Criminal Division
United States Department of Justice

Oral Argument: December 12, 1984

Charge:

Order: Sec. 241(a)(1), I&N Act [8 U.S.C. § 1251(a)(1)] — Excludable at entry under sections 2, 10, and 13 of the Displaced Persons Act of 1948 and sections 13 and 25 of the Immigration Act of 1924

Sec. 241(a)(2), I&N Act [8 U.S.C. § 1251(a)(2)] — Entered in violation of sections 2, 10 and 13 of the Displaced Persons Act of 1948 and sections 13 and 25 of the Immigration Act of 1924

Sec. 241(a)(19), I&N Act [8 U.S.C. § 1251(a)(19)] — Participation in Nazi persecution

APPLICATION: Termination of proceedings; waiver of deportability; suspension of deportation; asylum; withholding of deportation; voluntary departure

The respondent appeals from the immigration judge's May 23, 1984 decision finding the respondent deportable as charged and denying him relief from deportation. The respondent's appeal from the finding of deportability as charged will be dismissed. The respondent's appeal from the denial of his applications for asylum, withholding of deportation and suspension of deportation will also be dismissed. However, the Service's appeal from the immigration judge's grant to the respondent of the privilege of voluntary departure in lieu of deportation will be sustained.

The respondent is a 64-year-old male who is a native of the village of Dub, Macharenzi, Ukraine, the Soviet Union. He entered the United States on February 9, 1952, as an immigrant pursuant to the Displaced Persons Act of 1948, Pub. L. No. 80-774, ch. 647, 62 Stat. 1009, as amended ("the DPA"). On November 14, 1958 he became a naturalized citizen of the United States, and changed his name to John Demjanjuk.

Subsequently, the Government brought a denaturalization action against the respondent in the United States District Court for the Northern District of Ohio. *See United States v. Demjanjuk*, 518 F.Supp. 1362 (N.D. Ohio 1981). The Government alleged that the respondent illegally procured his citizenship because he failed to disclose at the times of his admission and naturalization that he had been a guard for the Nazi SS during World War II, and had

operated the gas chambers at a concentration camp in Treblinka, Poland, where 900,000 Jews were killed. *Id.* The district court found in favor of the Government and entered a judgment of denaturalization revoking the respondent's citizenship and cancelling his certificate of naturalization. *Id.* It found that the respondent had made material misrepresentations regarding the nature of his wartime activities in his application for a visa under the DPA. It held that clear and convincing evidence supported the government's contention that the appellant had willfully concealed that he had trained as an armed guard at Trawniki, Poland at a camp run by the German SS and thereafter served with the Nazis as an armed guard at the extermination camp in Treblinka, Poland. Since this information would have made appellant ineligible for a visa under the DPA and for his subsequent citizenship, the district court concluded that appellant's citizenship must be revoked under section 340(a) of the Act, 8 U.S.C. § 1451(a) because it was "illegally procured." *See Fedorenko v. United States*, 449 U.S. 490 (1981).

The district court considered documentary evidence, eyewitness identifications and the appellant's own testimony, which it found not to be credible, in making its findings. The court concluded that the respondent was an Ukranian soldier in the Soviet army when he was captured by the Germans in the Second World War (WW II) at the Battle of Kerch in the Crimea no later than May 19, 1942. *United States v. Demjanjuk, supra,* at 1364. After being incarcerated in a prisoner of war camp at Chelm, Poland the respondent's whereabouts were disputed. The respondent claimed that he was kept at Chelm until 1943 or 1944 and then transferred to a unit of the Ukranian National Army, a Nazi ally, which trained for but did not engage in military combat. *Id.* at 1376-1377. However, the court did not believe the respondent's testimony in view of the opposing evidence in the record.

The court found that the respondent had served with the German SS at the Trawniki camp where he had trained as a guard for the SS, based on an identity card described as authentic by expert witnesses. *Id.* at 1365-1369. Also, the court's decision carefully detailed the operation of the Treblinka extermination camp and concluded from the testimony of the five surviving witnesses presented that the respondent was a guard at Treblinka. *Id.* at 1376.

They had testified that the respondent operated the Treblinka gas chambers used to exterminate at least 900,000 Jews and that the respondent also engaged in numerous abuses of these victims and other prisoners at Treblinka. *Id.* at 1369-1373. The court specifically found that the identification of the respondent's photograph by these witnesses was reliable and not unduly suggestive. *Id.* at 1375. *Cf. Neil v. Biggers*, 409 U.S. 188 (1972); *Simmons v. United States*, 390 U.S. 377 (1968).

On June 28, 1981, the district court ordered the respondent denaturalized. It revoked and vacated the respondent's citizenship and canceled his Certificate of Naturalization (N-550). The United States Court of Appeals for the Sixth Circuit affirmed the judgment of denaturalization and the United States Supreme Court declined to review the matter. *See Demjanjuk v. United States*, 680 F.2d 32 (6th Cir. 1982), *cert. denied*, 459 U.S. 1036 (1982).

On December 6, 1982, the Immigration and Naturalization Service commenced deportation proceedings against the respondent charging him with deportability: (1) pursuant to section 241(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1), as an alien who was excludable under sections 2, 10, and 13 of the DPA and sections 13 and 25 of the Immigration Act of 1924, at the time of entry; (2) pursuant to section 241(a)(2) of the Act, 8 U.S.C. § 1251(a)(2), as an alien who entered the United States in violation of sections 2, 10, and 13 of the DPA and sections 13 and 25 of the Immigration Act of 1924; and (3) pursuant to 241(a)(19) of the Act, 8 U.S.C. § 1251(a)(19), as an alien who assisted the Nazi government of Germany in the persecution of persons because of their race, religion, national origin, or political opinion during the period between March 23, 1933 and May 8, 1945.

At the deportation hearing held before the immigration judge the respondent denied the charges of deportability. To prove its case the Service relied upon the testimony, exhibits, and judgment in the denaturalization case, all of which were admitted into evidence by the immigration judge (Group Exh. 3). In defense against the Service's charges, the respondent submitted various pleadings and memoranda from the denaturalization proceeding, new evidence, and several motions. The respondent also argued that he faced execution before a firing-squad if deported to the U.S.S.R. He applied for the following forms of relief from deportation: asylum pursuant to section 208 of the Act, 8 U.S.C. § 1158;

withholding of deportation to the U.S.S.R. pursuant to section 243(h) of the Act, 8 U.S.C. § 1253(h); suspension of deportation pursuant to section 244(a) of the Act, 8 U.S.C. § 1254(a); and voluntary departure pursuant to section 244(e) of the Act, 8 U.S.C. § 1254(e).

In a written decision dated May 19, 1983, the immigration judge applied the doctrine of collateral estoppel to the factual and legal issues resolved by the denaturalization judgment to find the respondent deportable as charged and ineligible for most forms of relief from deportation. The immigration judge, however, also granted the respondent voluntary departure, in lieu of deportation; designating the U.S.S.R. as the country of deportation in the event he failed to depart as required. In a timely appeal the respondent has challenged the immigration judge's use of collateral estoppel to establish deportability and ineligibility for relief from deportation. The Service has also appealed from the grant of voluntary departure in lieu of deportation.

The Legal Effect of the Judgment in The Denaturalization Proceeding

The respondent's case is determined by the judicially-developed doctrine of collateral estoppel in a deportation proceeding which requires a prior judgment between the parties that is sufficiently firm to be accorded conclusive effect. His deportability under sections 241(a)(1) and 241(a)(2) is established because the respondent is precluded from relitigating the court's findings that he was excludable at entry and also in the United States in violation of law. In addition, the court's factual findings establish deportability under section 241(a)(19), and therefore, ineligibility for relief from deportation under sections 243(h)(2)(A), 244(a)(1) and 244(e). These findings arise out of the facts and principles of law resolved in the respondent's denaturalization case.

For collateral estoppel to apply in this case the parties must have been accorded a full and fair opportunity to litigate the issues in the prior suit and the use of collateral estoppel must not be unfair to these parties. *Matter of Fedorenko*, Interim Decision 2963 (BIA 1984), and cases cited therein. These requirements are satisfied in the respondent's case. The district court's denaturalization judgment here is a final judgment and must be accorded conclusive effect because it was affirmed by the court of appeals and denied

review by the Supreme Court. Also because the denaturalization proceeding was before a federal district court and subject to the strict judicial rules of evidence, the respondent was given a full and fair opportunity to litigate the issues in his case.

We also find it fair to apply collateral estoppel in this proceeding. The respondent and the United States, who were the parties in the denaturalization proceeding, are also the parties in this proceeding, and the Government's burden of proof in the denaturalization proceeding was the same as its burden in this proceeding. *See Woodby v. INS*, 385 U.S. 276, 285-86 (1966); *Matter of Fedorenko, supra.* Moreover, both the respondent and the Government reasonably could have foreseen that issues raised in the denaturalization proceeding might be raised in a subsequent deportation proceeding. Several of the issues that were resolved by the outcome of the denaturalization judgment, such as issues pertaining to the respondent's inadmissibility under the DPA at the time he entered the United States and the issue of whether he assisted the Nazis in persecuting others, also pertain to grounds of deportability under the Act. *See, e.g.*, sections 241(a)(1), (a)(2), and (a)(19) of the Act.

The respondent has argued against application of the doctrine of collateral estoppel on the ground that the denaturalization proceeding did not provide him with a fair opportunity to litigate the issues in his case. The respondent contends that the evidence used to link him to the atrocities at Treblinka was a forgery. He contends that the Soviet government provided excludable altered evidence in the form of the Trawniki identity card and that the United States government engaged in affirmative misconduct by using this evidence against him. According to the respondent, the government is equitably estopped from seeking his deportation. He also claims that the denaturalization order by the federal district court in his case does not preclude his further litigating the ultimate factual issues in the deportation proceedings. He contends that the district court did not make specific findings of fact regarding the respondent's motives for engaging in the alleged persecution or that he had actually operated the gas chambers at Treblinka.

The respondent also contends against the constitutionality of section 241(a)(19) of the Act, claiming it constitutes an ex post facto law as well as a bill of attainder in his case. He also contends that it is improper to apply collateral estoppel in a section

241(a)(19) charge and that to do so deprived him of due process. He argues that he should have been given an opportunity to establish that the person who operated the gas chambers at Treblinka was someone else who had allegedly been killed during a 1943 uprising by the prisoners at Treblinka.

Finally, the respondent contends that he is eligible for asylum and withholding of deportation, suspension of deportation, and voluntary departure in lieu of deportation. He claims that designation of the Soviet Union as a place of deportation was cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

(1) Findings of fact conclusively established by the denaturalization judgment.

Under the doctrine of collateral estoppel, the denaturalization judgment conclusively establishes the "ultimate facts" of this deportation proceeding. These are the facts upon which the respondent's deportability and eligibility for relief from deportation are to be determined. *The Evergreens v. Nunan*, 141 F.2d 927, 931-32 (2d Cir.), *cert. denied*, 323 U.S. 720 (1944); *Matter of Fedorenko, supra.* There are three general categories of facts which are "ultimate" in this case. The first category consists of facts which pertain to the respondent's citizenship and nationality. These are "ultimate facts" because they are relevant to the issue of the respondent's alienage. They determine whether he is an "alien" subject to the various deportation provisions of section 241(a) of the Act. *1/* The second category consists of facts pertaining to the respondent's activities during World War II, and in particular to his activities at the Treblinka extermination camp. These are "ultimate facts" because they determine the respondent's deportability under sections 241(a)(1), (a)(2), and (a)(19), for being excludable under, and for entering in violation of, the DPA and for assisting the Nazis in persecuting others. Also these facts are relevant to the respondent's eligibility for various forms of relief from deportation. The third category of "ultimate facts" consists of facts pertaining to the respondent's application for a visa under the DPA and his immigration to this country in 1952. These are "ultimate facts" because they, too, determine the respondent's deportability under sections 241(a)(1) and (a)(2).

The following facts established by the denaturalization judgment come within one of these three categories. In 1948 the respondent began the process leading to his admission to the United States by filing an application for assistance with the Preliminary Commission for the International Refugee Organization. *United States v. Demjanjuk, supra* at 1379. The application represented that the respondent had been a farmer in Sobibor, Poland from 1937 through 1943 and in Pilau, Germany in 1944. *Id.* Based on the information in this application, the respondent was certified by the International Refugee Organization as a refugee and a displaced person. *Id.* Subsequently, in seeking admission to this country as a refugee, the respondent knowingly and willfully misrepresented, both in his visa application his birthplace and the facts about his activities during World War II. *Id.* at 1379-1380.

Since the foregoing facts found in the denaturalization proceeding are also "ultimate facts" in this case, we consider them to be conclusively established by operation of the doctrine of collateral estoppel. *The Evergreens v. Nunan, supra,* at 931; *Matter of Fedorenko, supra.*

(2) Matters of law conclusively resolved by the denaturalization judgment.

In the denaturalization proceeding the district court reached several conclusions of law which are material to issues in this proceeding. First, the district court concluded that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA *2/* and was ineligible for his visa under section 13 of the DPA *3/* because he participated in the persecution of others. The district court also concluded that the respondent was inadmissible under section 10 of the DPA *4/* because he knowingly and willfully misrepresented material facts about his participation in Nazi atrocities. *United States v. Demjanjuk, supra,* at 1382.

The doctrine of collateral estoppel may be applied to preclude reconsideration of issues of law, as well as of fact, so long as the issues arise in both the prior and subsequent suits from virtually identical facts and there has been no change in the controlling law. *Matter of Fedorenko, supra.* These conditions are met in this case. The issues of the respondent's inadmissibility under sections 2, 10, and 13 of the DPA arise in this proceeding because the re-

spondent is charged with deportability under sections 241(a)(1) and (a)(2) of the Act, for entering this country in violation of the DPA. Moreover, the issues arise in this proceeding out of the identical facts and the same principles of law that were considered by the district court.

Finally, the issues regarding the admissibility of the Trawniki identity card were also resolved against the respondent in the denaturalization proceedings by the district court. The district court specifically found that the Trawniki identity card was authentic and related to the respondent. *United States v. Demjanjuk, supra* at 1368. This finding was specifically upheld by the United States Court of Appeals for the Sixth Circuit. *United States v. Demjanjuk, supra* at 33. Consequently, the respondent is precluded from relitigating the authenticity and admissibility of the Trawniki identity card.

In any event, we are not persuaded by the respondent's allegations that the Trawniki card was manufactured false evidence. The biographical data in the card matches that of the respondent. The district court specifically noted that the only alterations in the original card were cyrillic handwritten notes in its left side which had been blocked off in the photographic copy. *United States v. Demjanjuk, supra* at 1368. The Trawniki card listed the fact that the respondent had a scar on his back from a shrapnel wound. *Id.* at 1369. The photograph in the card clearly reflects the respondent's facial features. Most significant is the respondent's attempt to exploit an apparent discrepancy in the color of his eyes at the denaturalization case which backfired badly against his credibility. The Trawniki card listed the respondent's eye color as grey. At the trial the respondent testified that his eyes were blue and that they were blue in 1942. (Dist. Ct. Tr. at 1074-1075.) However, the government introduced into evidence the respondent's December 27, 1951, application for an immigrant visa (Dist. Ct. Exh. 21) which listed the color of his eyes as grey. *Id.* Moreover, the respondent admits that the district court recently denied his motion to vacate the denaturalization order which had been similarly based on allegations of evidentiary fraud and prosecutorial misconduct. *United States v. Demjanjuk,* Civ. No. 77-923 (N.D. Ohio November 28, 1984). Thus, the respondent's contentions that the government is estopped from deporting him because it engaged in affir-

mative misconduct by introducing into evidence the Trawniki card are without merit. *5/*

Moreover, contrary to the respondent's allegations, the Trawniki card was not the sole evidence of the respondent's activities at Trawniki and Treblinka. (Brief p. 9.) The respondent's arguments conveniently ignore the fact that five surviving prisoners and a German guard identified the respondent's photograph as that of the Ivan who operated the gas chambers at Treblinka. *Id.* at 1371-1373. Also significant is the respondent's admission that he had a blood group tatoo inside his left arm, later removed, since an expert witness testified that only persons affiliated with the German SS had such tatoos and it was unlikely that an ordinary Soviet prisoner would be so marked. *Id.* at 1377-1378. Finally, the respondent's testimony that he was at the prisoner camp in Chelm, Poland, in 1944 until transferred to Graz, Austria, where he stayed for 3 or 4 weeks, when he was again transferred to Oelberg, Austria, in November of 1944 was implausible. This testimony would have placed him at Chelm until the fall of 1944. However, expert testimony revealed that the Soviet army had driven the Germans from Chelm by July of 1944. *Id.* at 1377. We therefore, find the respondent's equitable estoppel and affirmative misconduct contentions to be without merit.

1/ Section 241(a), which is the basis for the Service's charges of deportability, pertains only to an "alien." The term "alien" means any person who is not a citizen or national of the United States. Section 101(a)(3) of the Act, 8 U.S.C. § 1101(a)(3).

2/ Section 2 of the DPA defined those eligible for admission as a "displaced person" by reference to the definition of "refugee or displaced person" found in Annex I of the Constitution of the International Refugee Organization of the United Nations. *Fedorenko v. United States*, 449 U.S. 490, 495 nn. 3-4 (1981). That definition excluded the following classes: "any persons who . . . have assisted the enemy in persecuting civil populations of countries, members of the United Nations . . ." *Id.*

3/ Section 13 of the DPA, as amended in 1950, provided that no visa would be issued under the Act to "any person who advocated or assisted in the persecution of any person because of race, religion, or national origin . . ." *United States v. Demjanjuk*, *supra*, at 1382, note 43.

4/ Section 10 of the DPA placed the burden of proving eligibility as a "displaced person" on the person seeking admission and provided that "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person shall thereafter not be admissible into the United States." *Fedorenko v. United States*, *supra*, at 495.

5/ An estoppel can be invoked against the Government, if at all, only when Government conduct toward an alien amounts to "affirmative misconduct." *INS v. Miranda*, ____ U.S. ____, 103 S. Ct. 281, 282-84 (1982) *(per curiam); INS v. Hibi*, 414 U.S. 5, 8-9 (1973) *(per curiam)*. The respondent can not overcome by such "affirmative misconduct" claims the preclusive effect of the legal and factual isues resolved in the denaturalization proceeding.

The Respondent's Deportability

The district court's conclusion that the respondent was excluded from the definition of a "displaced person" by section 2 of the DPA renders the respondent deportable pursuant to section 241(a)(1) of the Act, as an alien who was excludable under the law at the time of his entry. Similarly, the district court's conclusions that the respondent was inadmissible under section 10 of the DPA and ineligible for his visa under section 13 of the DPA render the respondent deportable pursuant to section 241(a)(2) of the Act, as an alien who is in the United States in violation of the law. Thus, given the conclusions of law established by collateral estoppel, the immigration judge correctly found the respondent deportable pursuant to sections 241(a)(1) and (a)(2) of the Act.

The question of the respondent's deportability pursuant to section 241(a)(19) of the Act, was not actually litigated in the denaturalization proceeding and therefore collateral estoppel does not automatically resolve this issue. Nevertheless, the facts conclusively established by collateral estoppel also show the respondent to be deportable pursuant to section 241(a)(19). That section provides for the deportation of aliens who —

> during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with —
>
> (A) the Nazi government of Germany,
>
> (B) any government in any area occupied by the military forces of the Nazi government of Germany,
>
> (C) any government established with the assistance or cooperation of the Nazi government of Germany, or
>
> (D) any government which was an ally of the Nazi government of Germany,
>
> ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.

The respondent's activities at the Trawniki training camp and the Treblinka extermination camp occurred within the period of time

specified by section 241(a)(19). The elements of that section which remain at issue are whether: (1) the respondent "assisted or otherwise participated in the persecution of any person", (2) "because of religion or political opinion" and did so, (3) "under the direction of, or in association with" the Nazi government of Germany.

(1) "Assisted or otherwise participated in the persecution of any person".

The term "persecution" as used in section 241(a)(19) contemplates the infliction of suffering or harm, under government sanction, upon persons who differ from others in the ways specified by the Act, *i.e.*, race, religion, national origin, or political opinion. *Matter of Fedorenko, supra; Matter of Laipenieks,* 18 I&N Dec. 433 (BIA 1983); *reversed on other grounds, Laipenieks v. INS,* ____F.2d ____, Civ. No. 83-7711 (9th Cir. January 9, 1985). The facts established by collateral estoppel show that 900,000 people were exterminated at the Treblinka camp because they were Jews. *United States v. Demjanjuk, supra,* at 1369. Such participation in the extermination of innocent civilians clearly constitutes "persecution" of the victims within the meaning of section 241(a)(19). *See Matter of Fedorenko, supra.*

Moreover, the testimony of the respondent's participation in individual acts of atrocity was extensive. Witness Rajchman, who was a prisoner forced to remove valuable dental work from the corpses at Treblinka testified about the respondent's use of a wood drill to tortune one of the prisoners and other atrocities. *United States v. Demjanjuk, supra* at 1370 (Dist. Ct. Tr. at 426-427). Witness Rosenberg, who was one of the corpse carriers, testified about the many beatings the respondent administered to the victims as they were being herded into the gas chambers. *Id.* (Dist. Ct. Tr. at 515-516). Witness Rajgrodski, who was also a corpse carrier, testified about receiving twenty lashes from the respondent for being late for roll call. *Id.* at 1371. (Dist. Ct. Tr. at 582-592). Witness Lewkovics, who had been assigned to work in the kitchen and the laundry, witness Epstein, a corpse carrier, witness Horn, a German military nurse responsible for the corpse burners, and the previously mentioned witnesses all testified about the respondent's operation of the gas chambers. *Id.* at 1370-1371. (Dist. Ct. Tr. at 306-307, 325-330, 426, 514-515, 581, 611, 633, 651-652).

The respondent argues that the findings of the district court are not sufficient to meet this element of section 241(a)(19) because the court merely concluded that he was a guard at Treblinka and did not specifically state that he was the Ivan who operated the gas chambers. However, we have specifically held that the actions of a Ukrainian prisoner of war who was allegedly forced by the Nazis to guard the perimeter of a concentration camp constituted assistance in persecution within the meaning of section 241(a)(19) because his actions would have aided the Nazis, in some small measure, in their confinement of the prisoners of the camp. *Matter of Fedorenko, supra.* It is therefore clear that the respondent's being a guard in the Treblinka concentration and extermination camp by itself constituted assistance in persecution within the meaning of section 241(a)(19), because his actions would have significantly aided the Nazis in their extermination of the prisoners at the camp. *Id.*

(2) Persecution "because of religion".

The facts established by collateral estoppel, as noted above, show that the Nazis executed 900,000 persons at the Treblinka concentration camp because they were Jewish. The respondent argues, however, that to come within section 241(a)(19) of the Act, there must be a finding that he, himself, was motivated by religious or political prejudice and he correctly points out that there was no finding in the denaturalization proceeding about his motivations. We have recently held, however, that an alien's motivation and intent are irrelevant to the issue of his deportability under section 241(a)(19). *Matter of Laipenieks, supra; Matter of Fedorenko, supra.* The absence of a finding that the respondent had either religious or political motivations for his actions does not alter the fact that he "assisted" in physical persecution which occurred "because of" official policies directed against people of the Jewish religion. Thus, his conduct clearly constituted assistance in persecution "because of religion."

(3) "Under the direction of, or in association with" the Nazi government of Germany.

The facts established by collateral estoppel show that the respondent engaged in his activities at the Treblinka concentration camp and assisted the Nazis in their plan to arrest and execute

Jews. These findings clearly show that the respondent's activities at the Treblinka concentration camp were "under the direction of, or in association with" the Nazi government of Germany.

The facts discussed above show clearly, unequivocally, and convincingly that during WW II, under the direction of, or in association with, the Nazi government of Germany, the respondent assisted in the persecution of persons because of their religion. Thus, the immigration judge correctly found the respondent deportable pursuant to section 241(a)(19) of the Act.

The Respondent's Eligibility for Relief From Deportation

The respondent has argued that the immigration judge erred in finding him ineligible for suspension of deportation under section 244(a) of the Act. However, he contends that the immigration judge properly granted him voluntary departure under section 244(e). Under each of these sections of the Act, the particular relief afforded is unavailable to an alien who is deportable pursuant to section 241(a)(19) of the Act. *See* section 244(a) of the Act, as amended by Pub. L. No. 97-116, §§ 8, 18(h)(2), 95 Stat. 1611, 1616, 1620 (1981) [codified at 8 U.S.C. § 1254(a)]; section 244(e) of the Act, as amended by Pub. L. No. 95-549, § 105, 92 Stat. 2065, 2066 (1978) [codified at 8 U.S.C. § 1254(e)]; *see also Matter of Fedorenko, supra; Matter of Laipeneiks, supra.* Since the respondent is deportable pursuant to section 241(a)(19), he is precluded as a matter of law from obtaining voluntary departure and suspension of deportation. Consequently, the immigration judge correctly denied the respondent's application for suspension relief but erred in granting voluntary departure in lieu of deportation. Thus, the Service appeal from the voluntary departure grant will be sustained.

The respondent has also argued that he is eligible for either a discretionary grant of asylum or for mandatory withholding of deportation to the U.S.S.R. By law, neither asylum nor withholding of deportation is available to an alien ". . . who ordered, incited, assisted, or otherwise participated in the persecution of any persons on account of race, religion, nationality, membership in a particular social group, or political opinion." *See* the definition of "refugee" in section 101(a)(42)(A) of the Act, 8 U.S.C. §

1101(a)(42)(A), made applicable to claims for asylum by section 208 of the Act; *see also* section 243(h)(1) of the Act. The fact that the respondent assisted the Nazis in the Treblinka camp in their persecution of persons because of their religion or political opinion clearly excludes him from eligibility for asylum and withholding of deportation under the quoted provision. Thus, the immigration judge also correctly denied the respondent those forms of relief. Since, as noted above, the immigration judge erred in granting the respondent voluntary departure in lieu of deportation as he is precluded from granting such relief to an alien deportable under section 241(a)(19), the respondent will be ordered deported to the Soviet Union.

Miscellaneous Matters

The respondent argues that he may not be found deportable pursuant to section 241(a)(19) because it is an unconstitutional ex post facto law or bill of attainder. This argument lacks any merit whatsoever. *See Artukovic v. INS*, 693 F.2d 894 (9th Cir. 1982). It is well settled that the creation of a retroactive ground for deportation does not violate the ex post facto prohibition. *Marcello v. Bonds*, 349 U.S. 302, 314 (1955); *Galvan v. Press*, 347 U.S. 522, 531 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952). *Mahler v. Eby*, 264 U.S. 32 (1924); *Bugajewitz v. Adams*, 228 U.S. 585 (1913). That prohibition applies only to criminal statutes and deportation laws are civil, not criminal, in nature. *Id.* Moreover, the courts have rejected the argument that a deportation provision is an unconstitutional bill of attainder. *See e.g.*, *MacKay v. McAlexander*, 268 F.2d 35 (9th Cir. 1959), *cert. denied* 362 U.S. 961 (1960); *Quattrone v. Nicolls*, 210 F.2d 513, 519 (lst Cir.), *cert. denied*, 347 U.S. 976 (1954). The constitutional prohibition against bills of attainder was intended to prevent legislative punishment and trial by legislature. *U.S. v. Brown*, 381 U.S. 437, 442-444 (1965). This is clearly not the effect of section 241(a)(19), since deportation is not punishment, *Harisiades v. Shaughnessy*, *supra*, at 594. Section 241(a)(19) does not deprive an alien of his right to a full evidentary hearing on the issue of his deportability, with the right to judicial review. *See* sections 106(a) and 242(b) of the Act, 8 U.S.C. § 1105(a) and 1252(b). It is therefore clear that the prohibition in the eighth amendment against cruel and unusual punishments is inapplicable to deportation orders. *See Harisiades*

v. Shaughnessy, supra; Mahler v. Eby, supra; Bugajewitz v. Adams, supra; Cortes v. INS, 396 F.2d 965 (5th Cir. 1968); *Burr v. INS*, 350 F.2d 87 (9th Cir.), *cert. denied*, 383 U.S. 915 (1965); *Soewapadji v. Wixon*, 157 F.2d 289 (9 Cir.), *cert. denied*, 329 U.S. 792, *reh. denied*, 329 U.S. 833 (1946). Furthermore, it is well established that this Board is not the proper forum for a determination regarding the constitutionality of statutes enacted by Congress. *See Matter of Bogart*, 15 I&N Dec. 552 (BIA 1975, 1976; A.G. 1976); *Matter of Tamayo*, 15 I&N Dec. 426 (BIA 1975); *Matter of Swissair "Flight 164,"* 15 I&N Dec. 291 (BIA 1974).

The respondent also contends that the immigration judge erred in closing the proceedings after March 7, 1984. The transcript of the proceedings reflects that the immigration judge informed the parties that he would consider anything submitted by the respondent up to March 7, 1984. However, the immigration judge specifically stated that he was closing the proceedings then and that he would reopen the proceedings on his own motion only if he became convinced that it was necessary. (February 6, 1984, Tr. at 36-38). On March 7, 1984, the respondent filed several pleadings at the Immigration and Naturalization Service office in Cleveland, Ohio, instead of at the immigration court in Detroit, Michigan. 6/

We agree with the immigration judge's refusal to reopen and continue the deportation proceedings because the additional evidence proffered was cumulative and proffered for purposes or delay. The deportation proceedings had been going on for nearly 1 year. Four continuances had been granted to the respondent on May 12, 1983, October 26, 1983, January 16, 1984, and February 6, 1984, in order to prepare and present his defense. A motion for a continuance is within the sound discretion of the immigration judge and his denial of such a motion will not be disturbed unless the alien establishes that the denial caused him actual prejudice and harm, and materially affected the outcome of his case. *Matter of Sibrun*, 18 I&N Dec. 354 (BIA 1983). As noted above, the conclusions reached in the respondent's denaturalization case determine the outcome of this deportation proceeding. Consequently, the immigration judge properly refused to reopen and continue the proceedings when it appeared that the respondent was merely at-

tempting to further delay a deportation order in his case. Similarly, we disagree with the respondent's contention that the record of the deportation proceedings is incomplete and inadequate for appellate review. The record before us is sufficient to sustain a finding of deportability as charged without also having to reach the additional allegations of deportability for the respondent having served in the Vlassov army. The record contains clear, unequivocal, and convincing evidence that the respondent assisted in the persecution of Jews at Tremblinka from 1942 to 1943, as required for deportability by *Woodby v. INS*, 385 U.S. 276 (1966) and 8 C.F.R. § 242.14(a). The record also establishes that the respondent is precluded from relief from deportation. Consequently, the respondent's appeal will be dismissed, and the Service appeal from the grant of voluntary departure in lieu of deportation will be sustained.

ORDER: The respondent's appeal is dismissed.

FURTHER ORDER: The Service's appeal is sustained.

FURTHER ORDER: The respondent is ordered deported from the United States.

/S/ DAVID L. MILHOLLAN
Chairman

6/ The district office of the Service is not part of the immigration court. *See*, 8 C.F.R. § 100.4(b)24. The immigration judges are under the separate Executive Office for Immigration Review in the United States Department of Justice. *See* 8 C.F.R. § 2.1, 3.0, 3.9, 3.10.